

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CIVIL ACTION NO. 1:12-cv-00900-WMS

JEFFREY HEITZENRATER, GERONIMO
PADILLA, TIMOTHY HAWK, VALLIE
MASIAS, JASON ROBINSON, and
MARK GENOVESI, individually and
on behalf of all others similarly
situated,

Plaintiffs,

-vs-

OFFICEMAX, INCORPORATED and
OFFICEMAX NORTH AMERICA, INC.,

Defendants.

_____/

Shavitz Law Group, P. A.
1515 South Federal Highway
Suite 404
Boca Raton, Florida
10:10 a.m. - 4:28 p.m.
Thursday, February 26, 2015

- - - - -

DEPOSITION

Of

CHRIS RICHARDSON

- - - - -

Downtown Reporting

1 looking to trick you or trap you, so I want to make
2 sure you understand what you are answering.

3 I am going to try my best not to rehash
4 the first deposition, but there may by necessity be a
5 little bit of overlap, so you will excuse me in advance
6 if that is the case, but I will do my best not to
7 rehash those topics. Obviously -- well, actually, let
8 me step back a bit.

9 What is your current job title and
10 employer?

11 **A. My current job title is Vice President**
12 **for the East Region and I work for Office Depot,**
13 **Incorporated.**

14 **Q. And when did you begin working for Office**
15 **Depot?**

16 **A. I began working for Office Depot at the**
17 **point of the merger, which would have been November of**
18 **2013.**

19 **Q. And prior to that were you continually**
20 **employed by OfficeMax since the last deposition?**

21 **A. I have been, I have been employed by**
22 **OfficeMax since then.**

23 **Q. And your last deposition was I think in**
24 **the spring of 2013. What was your position at**
25 **OfficeMax at that time?**

1 A. At that time I would have been Vice
2 President of Store Operations.

3 Q. And did you continue to hold that title
4 with OfficeMax until the time of the Office Depot
5 merger?

6 A. Correct.

7 Q. And is the first position you held at
8 Office Depot Vice President of the East Region?

9 A. Yes -- with Office Depot, yes. That
10 transition occurred about January of 2014 in terms of
11 titles.

12 Q. Okay. And what are your duties as Vice
13 President of the East Regional Office Depot?

14 A. I oversee our store operations in the
15 East Region, I have 13 District Managers that report to
16 me. I handle strategic initiatives for the stores
17 within my area, support the corporate office in
18 executing strategies in the field, communicating to
19 District Managers, prioritizing, work communication,
20 train, develop District Managers to ensure their
21 success each and every day, provide feedback, provide
22 input on company strategic decisions both in retail and
23 overall.

24 Q. And I assume you know generally what the
25 Heitzenrater versus OfficeMax lawsuit is about?

1 **A. I do.**

2 Q. Okay. And do you understand you have
3 been designated as the corporate representative to
4 testify today on certain topics?

5 **A. I understand that.**

6 Q. Can we mark this as exhibit 1, please.
7 (Exhibit No. 1 was marked for
8 identification.)

9 Q. Can you take a look at what has been
10 marked as exhibit 1 and tell me if you recognize that
11 document.

12 (Witness examining document.)

13 **A. Yes, I have seen this document before.**

14 Q. And have you been designated as the
15 company's representative to testify on each of the
16 topics specified in this Notice?

17 **A. Yes.**

18 **MR. HUTTON:** Counsel, with one
19 exception-reservation and that's the one that I
20 had raised on the telephone.

21 He is prepared to testify as much as he
22 can on the decision to classify, topic 6, but
23 as I mentioned to you, that person truly most
24 knowledgeable on that, without an effective
25 substitute since the merger, is Knox McMillan,

1 input to help to develop an accurate job description
2 for any position.

3 Q. And do you know who was on the team that
4 developed this particular job description?

5 A. There are several people that would be
6 involved. So I would have been involved in this
7 particular job description, our Human Resources V. P.
8 would be involved in this, we would have a
9 representative from the Legal Department who would have
10 a representation from the Compensation Group.

11 Those would be the primary people that
12 would be responsible for the development of the job
13 description. Again, we may get field input as we get
14 drafts developed, but the positions I named would be
15 the primary.

16 Q. And do you recall who the individual or
17 individuals were in each of those positions that were
18 part of the team to develop this particular job
19 description?

20 A. So our V. P. of Human Resources would
21 have been Steve Dermanuelian.

22 Q. How do you spell that?

23 A. D-E-R-M-A-N-U-E-L-I-A-N.

24 Q. Okay.

25 A. From a compensation standpoint it would

1 have been Patricia Abrego-Santucci.

2 Q. I'm going to make you spell that one,
3 too.

4 A. A-B-R-E-G -- A-B-R-E-G-O hyphen
5 S-A-N-T-U-C-C-I, I believe.

6 Q. And legal?

7 A. And legal would have been Knox McMillan.

8 Q. And do you recall who, if anyone,
9 provided field input?

10 A. We would have had certainly Mary Bryan,
11 who was in a dual role of both corporate and field
12 support in Human Resources at this time.

13 Specifically others, I am sure we got
14 feedback from the Territory Vice Presidents at the
15 time. I don't recall any of them spending any more
16 time or less time versus just reviewing a draft.

17 Q. Okay. And what was done to identify the
18 position responsibilities listed on this document?

19 A. So, one, we had -- we set forth what we
20 wanted to -- we wanted this position to be within the
21 stores in terms of the function that it would play, how
22 it would support our stores and how we were going to
23 operate retail stores going forward, and we used
24 previous job descriptions, you know, to take
25 information, we used collective knowledge of how stores

1 and -- how stores operate on a day-to-day basis and
2 what would be appropriate for this position, and then
3 really determined what were the primary activities that
4 we wanted the Assistant Manager to perform to get the
5 desired outcome of a great customer experience and
6 associate experience in the store each day.

7 Q. Can you mark that as exhibit 3, please.
8 (Exhibit No. 3 was marked for
9 identification.)

10 Q. Off the record.
11 (Discussion off the record.)

12 BY MS. STERN:

13 Q. Can you tell me what has been marked as
14 exhibit 3, please.
15 (Witness examining document.)

16 A. Yes. This is an Assistant Store Manager
17 job description with an updated date of April, 2011.

18 Q. Okay. So that is the last changed, it
19 means that the description itself was revised in April
20 of 2011?

21 A. So, yes, this job description would have
22 become effective in April of 2011.

23 Q. And last evaluated still says May of
24 2008, correct?

25 A. It does. We do an ongoing evaluation of

1 the exempt status.

2 MS. STERN: And, actually, I think that
3 this topic on the outline was not limited by
4 date parameters, Lee, so I think it is within
5 the scope of the deposition notice.

6 MR. HUTTON: I don't read the topic that
7 way. It talks about complaints, lawsuits and
8 threatened lawsuits as opposed to informal
9 expressions of thought.

10 MS. STERN: And that is topic 12. I
11 believe that there are other topics in the
12 outline that address more informal complaints.

13 In any event, we can address that issue
14 later if need be. The witness has answered the
15 question, so let's move on.

16 BY MS. STERN:

17 Q. Do you know who was involved in creating
18 this April, 2000 version of the job description?

19 A. In April, 2011 it largely would have been
20 the same group of individuals that was mentioned for
21 the 2008, with the possible exception, I would have to
22 validate dates, is that Steve Dermanuelian may not have
23 been involved in this one and it would have been Mary
24 Bryan who would have participated in that, but Knox
25 McMillan would have been involved, and Patricia

1 Abrego-Santucci would have been involved as well.

2 Q. And what was the impetus for creating a
3 revised job description in April of 2011?

4 A. There were minor adjustments made to this
5 to create a little bit more of a focus around having a
6 selling environment, to create a slightly different
7 experience for our customers, where we were looking
8 more to have a solutions environment and balance this
9 job description a little bit more, so a little less
10 focus on operational components and a little bit more
11 on selling components. The changes were subtle.

12 Q. And was there more focus on customer
13 service in the 2011 job description?

14 A. So I would say the experience that
15 customers get in terms of how our associates interact
16 with them, so when I say selling environments or
17 selling culture, that is really what I mean.

18 I think we always had a focus on
19 providing a great customer service experience for our
20 customers.

21 Q. And at the time this job description was
22 revised in 2011 you didn't specifically look at whether
23 the position should or shouldn't be reclassified, did
24 you?

25 A. Again, as I mentioned, we are constantly

1 MS. STERN: All right, Fran, we are back
2 on.

3 MR. HUTTON: She has us on mute.

4 BY MS. STERN:

5 Q. So prior to the time the position was
6 reclassified as nonexempt, what, if anything, did
7 OfficeMax do to make sure that the ASMs were properly
8 classified as exempt?

9 A. There would be several things that we
10 would do, you know, a lot of it came from feedback
11 from, you know, the field, any observations that they
12 have.

13 There would be observations from, you
14 know, people from the corporate office, myself
15 included. When we visited the stores we would talk to
16 Assistant Store Managers, we talked to Store Managers,
17 we talked to District Managers, we would work with the
18 Legal Department to, you know, talk through what the
19 observations were and validate that, you know, one, the
20 position descriptions, the job description was still
21 accurate, but as well as, you know, any status
22 implications based on what we are seeing and observing,
23 you know, that might impact that job.

24 Q. Was there anyone in particular, and let's
25 say since the year 2000, who has been charged with

1 process.

2 Q. How many times did you speak with Knox in
3 connection with the 2008 job description for the ASM
4 position regarding the exempt status of the position?

5 A. I don't know that I can recall the exact
6 number. It would have been several conversations.

7 Q. And was that in person or by telephone?

8 MR. HUTTON: I am sorry. I did not hear
9 your question.

10 BY MS. STERN:

11 Q. Was that in person or by telephone?

12 MR. HUTTON: Thank you.

13 THE WITNESS: It would have been some of
14 both. Knox was located in Boise, I was -- my
15 office was in Naperville, so some of those
16 would have been via phone, and when he was in
17 Naperville some of them would have been in
18 person.

19 BY MS. STERN:

20 Q. Can you tell me specifically what was
21 discussed during these conversations regarding the
22 exempt status of the ASM position?

23 MR. HUTTON: Objection, attorney-client
24 privilege, I instruct you not to answer.

25 MS. STERN: Well, Lee, the defendants

1 written. There may have been some emails to discuss or
2 set up times. It would have been highly unlikely that
3 we would have had any details that we would have
4 written.

5 We did most of the communication via
6 phone or in person, as I previously answered.

7 Q. And why would it be that you would do
8 that by telephone or in person rather than in writing?

9 A. I would tell you more than anything else,
10 it is just easier to communicate the nuances of the job
11 descriptions and how the business works. It is not
12 easy to put that in a written form.

13 Q. And in 2011, when the job description was
14 revised, who made the decision to classify the position
15 as exempt at that time?

16 A. Again, I tell you the same process that
17 was used in 2008 was utilized in 2011.

18 Q. And Knox was part of those decisions?

19 A. Knox was part of those decisions.

20 Q. And you communicated directly with Knox?

21 A. I would have communicated directly with
22 Knox.

23 Q. Is there anyone else in the Legal
24 Department that you communicated with at the time
25 regarding the classification decision?

1 A. I don't recall communicating with anyone
2 else in the Legal Department. I would have primarily
3 gone through Knox.

4 Q. And would anyone else on your team have
5 communicated with someone else in the Legal Department?

6 A. It would be unlikely. Knox was our
7 contact for this information.

8 Q. And is Knox the individual who made the
9 exemption decision in 2011?

10 A. I would tell you the same process that we
11 utilized in 2008 was utilized again in 2011.

12 Q. And did you communicate with Knox
13 regarding the 2011 job description both in person and
14 by telephone?

15 A. It would have been a combination of both,
16 yes.

17 Q. On how many occasions?

18 A. Multiple occasions. I don't know exactly
19 how many.

20 Q. Can you tell me the substance of those
21 communications?

22 MR. HUTTON: Objection, attorney-client
23 privilege. Do not answer the question.

24 BY MS. STERN:

25 Q. Did you have communications with Knox in

1 question.

2 (Thereupon, the question was read
3 back by the reporter.)

4 **THE WITNESS:** Yes, there were,
5 discussions would be had, again, as part of
6 just normal ongoing conversations that we would
7 have with legal.

8 **BY MS. STERN:**

9 Q. Were there any such discussions that you
10 are aware of that did not involve the Legal Department?

11 **A. That I am aware of, no.**

12 Q. And I think you said it was legal who is
13 ultimately responsible for making the exemption
14 determination, is that correct?

15 **A. They would be actively involved in any of
16 those discussions and making any final determinations.**

17 Q. Were you personally involved in
18 discussions with the Legal Department regarding the
19 exempt status of the ASM position?

20 **A. I have had discussions with Knox McMillan
21 within the Legal Department around the job
22 descriptions, as we discussed earlier.**

23 Q. And when you say "around the job
24 descriptions, as we discussed earlier," are you
25 speaking about the 2008 and 2011 ASM job descriptions

1 that we marked?

2 A. Yes, that would be correct.

3 Q. And were those discussions in conjunction
4 with the preparation and issuance of those job
5 descriptions?

6 A. That would have been a component of those
7 discussions around the job descriptions and the
8 responsibilities and duties of an Assistant Store
9 Manager.

10 Q. So is it the case, then, that as part of
11 creating those job descriptions in both 2008 and 2011
12 there was a specific inquiry as to the proper
13 classification of that position?

14 A. I don't know that I would call it an
15 inquiry versus discussion around what is the Assistant
16 Managers, what have your observations been, what has
17 changed, and Knox and I would have had fluid
18 conversations, not specifically on these two dates, but
19 throughout, you know, time to -- you know, as to how
20 our Assistant Managers are performing their duties and
21 validating that it is accurate.

22 Q. Well, when that 2008 job description,
23 which we previously marked, was created, did you speak
24 with anyone other than Knox from the Legal Department
25 regarding the classification of those positions exempt?

1 A. Knox would have been my primary contact
2 in the Legal Department.

3 Q. Was there anyone else on the team who
4 created that job description that would have spoken
5 with anyone else in the Legal Department about the
6 exempt status of the position?

7 A. Highly unlikely, not -- almost all of
8 those conversations went through Knox.

9 Q. Is Knox the individual who made the
10 determination that that position is exempt?

11 A. He certainly provided counsel. I would
12 say that it was a collective agreement that we were
13 doing the right thing, making the right decisions, and
14 we had a position description that would accurately
15 reflect what we expected from the Assistant Store
16 Manager position.

17 Q. And when you said we made a collective
18 decision on the exemption status of that position, who
19 is "we" collectively?

20 A. It is all of the people that I mentioned
21 earlier, so Knox would have been the lead in that
22 component of it, but we as a team, so myself, Pat
23 Abrego-Santucci and Steve Dermanuelian and/or Mary
24 Bryan would have been a part of those conversations.
25 Knox would have guided us in our decision-making

1 asserted exemption defenses and good faith
2 defenses, and if the company is relying on the
3 decisions made by and the advice provided by
4 Knox, then I think there is a waiver of any
5 privilege in that regard.

6 **MR. HUTTON:** We are not waiving privilege
7 in this deposition. I don't want to debate it,
8 but we are not waiving the privilege.

9 **MS. STERN:** And you are instructing your
10 client not to answer any questions about the
11 specific discussions with Knox regarding the
12 exemption decision?

13 **MR. HUTTON:** I am instructing the client
14 not to answer that question and I will instruct
15 the client not to answer questions which are
16 covered by the attorney-client privilege.

17 **MS. STERN:** All right. Well, we are
18 going to have to address that with the Judge,
19 then, because I think that we are clearly
20 entitled to know that information.

21 **BY MS. STERN:**

22 Q. All right. Did you have any written
23 communications with Knox regarding the decision to
24 classify the position of ASM as exempt in 2008?

25 A. I don't recall if I had any specific

1 A. I don't recall communicating with anyone
2 else in the Legal Department. I would have primarily
3 gone through Knox.

4 Q. And would anyone else on your team have
5 communicated with someone else in the Legal Department?

6 A. It would be unlikely. Knox was our
7 contact for this information.

8 Q. And is Knox the individual who made the
9 exemption decision in 2011?

10 A. I would tell you the same process that we
11 utilized in 2008 was utilized again in 2011.

12 Q. And did you communicate with Knox
13 regarding the 2011 job description both in person and
14 by telephone?

15 A. It would have been a combination of both,
16 yes.

17 Q. On how many occasions?

18 A. Multiple occasions. I don't know exactly
19 how many.

20 Q. Can you tell me the substance of those
21 communications?

22 MR. HUTTON: Objection, attorney-client
23 privilege. Do not answer the question.

24 BY MS. STERN:

25 Q. Did you have communications with Knox in

1 **A. That would be correct.**

2 Q. And you indicated before the lunch break
3 that you had conversations with him in both 2008 and
4 2011 regarding the classification of the ASM positions
5 exempt, correct?

6 **A. Yes, I consulted with him.**

7 Q. You consulted with him on that issue both
8 by phone and in person on several occasions, correct?

9 **A. Correct.**

10 Q. And your attorney advised you not to tell
11 me about any of those communications, correct?

12 **A. I seem to recall that all transpiring,**
13 **yes.**

14 Q. Okay. Without telling me the substance
15 of the communications you had with Knox on the issue of
16 the exempt status of the ASM position, did you consider
17 what he had to say on that topic with respect to the
18 decision to classify the position as exempt?

19 **A. Yes, we considered what he would have**
20 **said, yes, it would have had considerable components as**
21 **to what final decision we made, yes.**

22 Q. In both 2008 and 2011?

23 **A. Correct.**

24 Q. And did the team rely on Mr. McMillan's
25 input in that regard in both 2008 and 2011?

1 A. Yes.

2 Q. All right.

3 MS. STERN: Well, Lee, unless you want to
4 reconsider and allow the witness to answer my
5 questions regarding the specific nature of
6 those communications, then it is my intention
7 to file a motion with the court to compel
8 testimony in that regard because we do think it
9 is relevant and that privilege has been waived
10 by virtue of the defenses asserted in this case
11 by the defendant.

12 MR. HUTTON: The instruction still
13 stands, and we can disagree on that and let the
14 court decide the meaning of the privilege as it
15 pertains to those affirmative defenses.

16 MS. STERN: That is fine. And just so
17 you know, I don't want you to think we are
18 hiding the ball, somebody from Fran's office
19 did call the court during lunch to ask if that
20 is something that should be addressed by
21 telephone with the court today during the
22 deposition or afterwards and we were advised
23 that they don't want to hear from us today
24 during the deposition and we should just file
25 motions afterwards, so we are going to go ahead

1 have been general business -- one, general
2 business, how is the business doing, how are
3 sales compared to expectations.

4 **MR. HUTTON:** And you are free to inquire
5 into all of those.

6 **BY MS. STERN:**

7 Q. Okay. Well, let me just short circuit
8 this a bit, because I am not asking about every
9 conversation you had with him and every conversation
10 you covered.

11 **A. Okay.**

12 Q. I am asking specifically about any
13 communications you had with him related to the
14 classification of the ASM position.

15 **A. I am certain on some of those**
16 **conversations we would have talked about the**
17 **classification of Assistant Store Managers and just**
18 **other position descriptions, job descriptions that we**
19 **had within OfficeMax, the Assistant Manager would be**
20 **included in that.**

21 Q. Tell me specifically what was said
22 between the two of you during those conversations
23 regarding the classification of the ASM position.

24 **MR. HUTTON:** May I inquire, so that we
25 can determine whether and/or if the boundary of

1 a date and time that would be great, if not, I am still
2 asking you to tell me the general substance of what was
3 discussed.

4 **MR. HUTTON:** And I am not going to permit
5 you to provide the details and the substance.
6 You may provide topics.

7 **THE WITNESS:** So I touched on topics.
8 Other topics might include the training that
9 was being conducted in stores, how we are
10 communicating with the stores, and whether or
11 not there has been any feedback or changes in
12 observations around any of our positions in our
13 stores, including Assistant Store Managers.

14 **BY MS. STERN:**

15 Q. Okay. With respect to the topic of the
16 job duties and classification of the Assistant Store
17 Managers, I would like you to tell me specifically what
18 you and Knox discussed.

19 **MR. HUTTON:** Objection, attorney-client
20 privilege. I instruct you not to answer.

21 **MS. STERN:** Okay. We will add that to
22 our motion to compel. Can you mark this
23 exhibit 7, please.

24 (Exhibit No. 7 was marked for
25 identification.)

1 reporter?

2 A. Yes.

3 Q. Did you read any notes you personally
4 took during your first deposition to prepare for today?

5 A. I didn't take any notes during that
6 deposition.

7 Q. Did you review Mr. McMillan's transcript
8 from his testimony in this case?

9 A. That was -- I did review his transcript
10 briefly.

11 Q. And you said you reviewed the documents
12 you signed. Would those be the corporation's
13 interrogatory answers?

14 A. Yes.

15 Q. Did you review the declaration you
16 signed?

17 A. I did.

18 Q. Can you recall any other documents you
19 reviewed to prepare for today's deposition?

20 A. I think most of the documents that I
21 reviewed fell into one of those categories that I gave
22 you.

23 Q. Other than the interrogatory answers and
24 declaration, were the documents that you reviewed, the
25 corporate records, so to speak, the store standards,

1 and do that.

2 MR. HUTTON: Okay.

3 BY MS. STERN:

4 Q. Are you aware that some of the documents
5 that we sought production of in this case have been
6 identified by your counsel as subject to
7 attorney-client privilege and not produced?

8 A. I am not aware of any specific documents.
9 If that has happened, I am sure it happened, so.

10 Q. Have you reviewed the privilege log that
11 your attorneys produced to us in this case?

12 A. I haven't reviewed a privilege log, no.

13 Q. Do you know who Adam Barton is?

14 A. Adam Barton, Adam would have worked on my
15 team in store operations and he was kind of the
16 day-to-day manager of our Workforce Management system,
17 scheduling system.

18 Q. And what about Kirk Gautreau
19 G-A-U-T-R-E-A-U?

20 A. Kirk Gautreau, he was in Associate
21 Relations, and so he was part of the Human Resources
22 team and would have been somebody that we would consult
23 against certain associates, how it might impact
24 associates.

25 Q. And have you ever conferred with either

1 MS. STERN: All right, Fran, we are back
2 on.

3 MR. HUTTON: She has us on mute.

4 BY MS. STERN:

5 Q. So prior to the time the position was
6 reclassified as nonexempt, what, if anything, did
7 OfficeMax do to make sure that the ASMs were properly
8 classified as exempt?

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10 would do, you know, a lot of it came from feedback
11 from, you know, the field, any observations that they
12 have.

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14 know, people from the corporate office, myself
15 included. When we visited the stores we would talk to
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18 Legal Department to, you know, talk through what the
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21 accurate, but as well as, you know, any status
22 implications based on what we are seeing and observing,
23 you know, that might impact that job.

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25 say since the year 2000, who has been charged with

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6 phone or in person, as I previously answered.

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8 that by telephone or in person rather than in writing?

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10 it is just easier to communicate the nuances of the job
11 descriptions and how the business works. It is not
12 easy to put that in a written form.

13 Q. And in 2011, when the job description was
14 revised, who made the decision to classify the position
15 as exempt at that time?

16 A. Again, I tell you the same process that
17 was used in 2008 was utilized in 2011.

18 Q. And Knox was part of those decisions?

19 A. Knox was part of those decisions.

20 Q. And you communicated directly with Knox?

21 A. I would have communicated directly with
22 Knox.

23 Q. Is there anyone else in the Legal
24 Department that you communicated with at the time
25 regarding the classification decision?

1 A. I don't recall communicating with anyone
2 else in the Legal Department. I would have primarily
3 gone through Knox.

4 Q. And would anyone else on your team have
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9 exemption decision in 2011?

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11 utilized in 2008 was utilized again in 2011.

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23 privilege. Do not answer the question.

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25 Q. Did you have communications with Knox in

1 **A. That would be correct.**

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3 that you had conversations with him in both 2008 and
4 2011 regarding the classification of the ASM positions
5 exempt, correct?

6 **A. Yes, I consulted with him.**

7 Q. You consulted with him on that issue both
8 by phone and in person on several occasions, correct?

9 **A. Correct.**

10 Q. And your attorney advised you not to tell
11 me about any of those communications, correct?

12 **A. I seem to recall that all transpiring,**
13 **yes.**

14 Q. Okay. Without telling me the substance
15 of the communications you had with Knox on the issue of
16 the exempt status of the ASM position, did you consider
17 what he had to say on that topic with respect to the
18 decision to classify the position as exempt?

19 **A. Yes, we considered what he would have**
20 **said, yes, it would have had considerable components as**
21 **to what final decision we made, yes.**

22 Q. In both 2008 and 2011?

23 **A. Correct.**

24 Q. And did the team rely on Mr. McMillan's
25 input in that regard in both 2008 and 2011?

1 **A. Yes.**

2 **Q. All right.**

3 **MS. STERN:** Well, Lee, unless you want to
4 reconsider and allow the witness to answer my
5 questions regarding the specific nature of
6 those communications, then it is my intention
7 to file a motion with the court to compel
8 testimony in that regard because we do think it
9 is relevant and that privilege has been waived
10 by virtue of the defenses asserted in this case
11 by the defendant.

12 **MR. HUTTON:** The instruction still
13 stands, and we can disagree on that and let the
14 court decide the meaning of the privilege as it
15 pertains to those affirmative defenses.

16 **MS. STERN:** That is fine. And just so
17 you know, I don't want you to think we are
18 hiding the ball, somebody from Fran's office
19 did call the court during lunch to ask if that
20 is something that should be addressed by
21 telephone with the court today during the
22 deposition or afterwards and we were advised
23 that they don't want to hear from us today
24 during the deposition and we should just file
25 motions afterwards, so we are going to go ahead